

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
ROCHDALE VILLAGE	)	ORDER RESPONDING TO
POWER PLANT	)	PETITIONER'S REQUEST THAT
	)	THE ADMINISTRATOR OBJECT
Permit ID: 2-6307-00273/00001	)	TO ISSUANCE OF A
Facility DEC ID: 2630700273	)	STATE OPERATING PERMIT
Issued by the New York State	)	
Department of Environmental Conservation	)	Petition No.: II-2000-04
Region 2	)	

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ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR OBJECTION TO PERMIT

On June 7, 2000, the Environmental Protection Agency ("EPA") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the Rochdale Village Power Plant ("Rochdale Village"). The Rochdale Village permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC") on April 7, 2000, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 616, 621, and 624. DEC subsequently withdrew and re-issued the permit for purposes of newspaper notification, effective September 18, 2000<sup>1</sup>.

The petition alleges that the Rochdale Village permit does not comply with 40 CFR part 70 in that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (3) the permit entirely lacks a statement of basis as required by 40 CFR § 70.7(a)(5); (4) the permit repeatedly violates the 40 CFR § 70.6(a)(3)(iii)(A) requirement that the permittee submit reports of any required monitoring at least every six months; (5) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (6) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violations of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (7) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); and (8) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. The Petitioner has requested that EPA object to the issuance of the Rochdale Village Permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

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<sup>1</sup> The DEC determined that the April 7 permit was invalid because the notice of complete application had not been published in a local newspaper. Such notification was subsequently completed, and the permit was reissued. Some administrative changes resulted from this reissuance, due to revisions in the standard conditions applied to all permits of that time. Details are discussed in later sections of this Order.

Subsequent to receipt of the NYPIRG petition, the EPA performed an independent and in-depth review of the Rochdale Village title V permit. Based on a review of all the information before me, including the petition; the permit application; a February 18, 2000 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA regarding Responsiveness Summary/Proposed Final Permit [hereinafter, “Responsiveness Summary” or “response to comments document”]; the Rochdale Village permits of April 7 and September 18, 2000; and two letters dated July 18, 2000 and July 19, 2000 from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC, I deny in part and grant in part the Petitioner’s request that I object to this permit, for the reasons set forth in this Order. Petitioner has raised valid issues on the Rochdale Village permit, which has resulted in our granting portions of the petition. This petition also raised programmatic issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 (“commitment letter” or “November 16 letter”).

## **I. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York effective December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); *see also* 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York’s title V operating permit program based, in part, on “emergency” rules promulgated by DEC. 66 Fed. Reg. 63180 (Dec. 5, 2001). Once DEC adopted final regulations to replace the emergency rules, EPA granted full approval to New York’s title V operating permit program based on these final rules. 67 Fed. Reg. 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”) but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under §§ 505(a) and (b)(1) of the Act and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit all operating permits proposed pursuant to title V to EPA for review and EPA will object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR part 70. If EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA’s 45-day review period, to object to the permit. To justify exercise of an objection by EPA to a title V permit pursuant to § 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of part 70. Petitions must, in general, be based on objections to

the permit that were raised with reasonable specificity during the public comment period.<sup>2</sup> A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

## **II. ISSUES RAISED BY THE PETITIONER**<sup>3</sup>

On April 13, 1999, NYPIRG sent a petition to EPA which brought programmatic problems concerning DEC's application form and instructions to our attention. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including the instant petition, and in a citizen comment letter, dated, March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. Sierra Club and the New York Public Interest Research Group v. EPA, No. 00-1262 (D.C.Cir.).<sup>4</sup> EPA has conferred with NYPIRG and DEC relative to these program implementation concerns.

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. DEC's fulfillment of the commitment set forth in the November 16, 2001 letter will resolve some administration problems. EPA is monitoring New York's title V program to ensure that the permitting authority is implementing the program consistent with its approved program, the CAA, and EPA's regulations. According to a recent review, DEC has made many of the necessary changes, and is substantially meeting its commitments.<sup>5</sup> As a result, EPA has not issued a notice of deficiency at this time. Failure to properly administer or enforce the program will result in issuance of a Notice of Deficiency pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

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<sup>2</sup> See CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. See Letter from Keri Powell, Esq. and Larry Shapiro, Esq., of NYPIRG to DEC (September 2, 1999) ("NYPIRG Comment Letter").

<sup>3</sup> Issues A-G have been raised previously by Petitioner and addressed by the Administrator in Orders responding to the petitions. In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, Jan. 16, 2002 ("Yeshiva"), In the Matter of Action Packaging Corp., Petition Number II-2000-02, Jan. 16, 2002 ("Action Packaging"), In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, Jan. 16, 2002 ("Kings Plaza"). These Orders are available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm>.

<sup>4</sup> EPA responded to NYPIRG's March 11, 2001 comment letter by letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc. The response letter is available on the internet at <http://www.epa.gov/air/oaqps/permits/response/>.

<sup>5</sup> See letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2, to John Higgins, Chief, Bureau of Stationary Sources, DEC. This letter summarizes an EPA review of draft permits issued by the DEC from December 1, 2001 through February 28, 2002. EPA is providing DEC with monthly updates to supplement the information provided in the March 7, 2002 letter. The purpose of this ongoing EPA review is to determine whether the DEC is making changes to public notices and to select permit provisions that the State committed to doing in its November 16, 2001 letter.

## A. Public Hearing

### 1. Flawed Public Notice

Petitioner alleges that DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. Petition at page 3. Pursuant to 40 CFR § 70.8(c)(iii), failure to process the permit under procedures approved to meet § 70.7(h) may be grounds for objection.

Petitioner asserts that the public notice did not meet the requirement of 40 CFR § 70.7(h)(2) because it did not indicate the “time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled).” *See also* § 502(b)(6) of the Act. In this case, the DEC did not schedule a hearing and did not inform the public of how to request a hearing. Petitioner is correct that technically this is a defect in the DEC’s public notice procedure for this permit. However, there is no allegation that NYPIRG was prejudiced or harmed as a result of DEC’s failure to indicate the procedures that must be followed to request a hearing. To the contrary, Petitioner was able to request a hearing, this request was considered by DEC and responded to in the Responsiveness Summary. *See* Cover Letter to Responsiveness Summary. No additional comments or hearing requests were received on this proposed permit and no other petitions have been filed concerning this permit.<sup>6</sup> Moreover, petitioner has not alleged or demonstrated that had DEC properly listed the procedures for requesting a hearing a different outcome would have resulted. Therefore, EPA finds that DEC’s procedural error was harmless and did not prejudice the Petitioner or hinder the Petitioner’s ability to request a hearing on this draft permit. *See e.g. Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached”); *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967) (“The Supreme Court’s opinion reflects the concern that agencies not be reversed for error that is not prejudicial.”). Accordingly, EPA denies the petition on this point.

This determination, however, does not relieve DEC of its responsibility to provide all members of the public with an opportunity to participate in the title V process consistent with New York State and EPA regulations. *See* 6 NYCRR § 621.6 and 40 CFR § 70.7(h). DEC’s failure to provide in its public notice a procedure by which members of the public can request a hearing may be grounds for granting a petition, particularly when a member of the public is prejudiced or harmed by the procedural error. Therefore, EPA has determined that the failure to provide a clear statement as to how to request a public hearing must be corrected and has so advised the DEC.<sup>7</sup> In a letter dated November 16, 2001 DEC committed to revise the language in the public notice, to indicate whom the public should contact to request a public hearing. *See* Commitment letter at p. 5. According to a recent review, DEC is substantially meeting this commitment. *See* note 5, *supra*. Failure to consistently adhere to the requirements of 40 CFR §

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<sup>6</sup> In the July 18, 2000, letter, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC, EPA pointed out to the DEC that the failure to provide directions for requesting a hearing represents improper implementation of the program. DEC reiterated its understanding of the public hearing process in its November 16, 2001 commitment letter at page 5.

<sup>7</sup> Part 70 does not require permitting authorities to hold a public hearing each time one is requested. Members of the public seeking to participate in the permitting process should not expect that a hearing will always be held on a draft permit and should also submit any comments or concerns in writing.

70.7(h)(2) and § 502(b)(6) of the Act can result in a program deficiency.<sup>8</sup> Furthermore, EPA retains the authority to review the need for public hearings for all permits and may object to any permit in the future that is not properly noticed. *See* 40 CFR § 70.8(c)(3)(iii).

## 2. Application of Improper Standard

Petitioner also contends that the DEC applied the wrong standard in reaching the decision to deny the Petitioner's request for a public hearing. Petition at page 4. Petitioner points out that in denying the public hearing, DEC asserted in the Responsiveness Summary that a public hearing would be appropriate if DEC determined that "there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards." Petitioner argues that DEC applied the standard that governs when DEC can hold a hearing on its own initiative, rather than the standard that governs when DEC receives a request from a member of the public for a hearing.<sup>9</sup>

40 CFR § 70.7(h) provides that "all permit proceedings, including initial permit issuance...shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." Part 70 does not provide specific guidance on when, or under what circumstances, a hearing should be held. Accordingly, permitting authorities have considerable discretion when determining whether to hold a public hearing. A review of New York's regulations finds that the requirements of 6 NYCRR § 621.7 are in accord with the provisions of 40 CFR § 70.7(h) and closely parallel the language of 40 CFR § 71.11(f)(1).<sup>10</sup>

DEC acknowledges that the correct standard for the permitting authority to apply when carrying out the title V function is whether there is a significant degree of public interest in the permit. *See* 6 NYCRR § 621.7(c)(1). In this instance, however, DEC's denial of a hearing is at most harmless error and does not warrant EPA objection to the Rochdale Village permit. Part 70 requires an opportunity for a hearing but does not specify what standard a permitting authority must apply when a member of the public requests a hearing. *See* 40 CFR § 70.7(h). In response to NYPIRG's request for a public hearing on the draft permit, DEC wrote: "Based on a careful review of the subject application and comments received thus far, the [DEC] has determined that a public hearing concerning this permit is not warranted." Cover letter to Responsiveness Summary. In addition DEC noted that it received detailed comments on the permit from Petitioner, who was the only commenter, and responded to those comments in writing. Given

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<sup>8</sup> Pursuant to 40 CFR § 70.10(b)(1) if EPA determines that a permitting authority is not adequately administering a part 70 program, EPA will notify the permitting authority of the determination and publish such notice in the Federal Register.

<sup>9</sup> Petitioner points out that 6 NYCRR § 621.7 defines two types of hearings: adjudicatory and legislative. Under 6 NYCRR § 621.7(b), DEC determines to hold an adjudicatory public hearing when "substantive and significant issues relating to any findings or determinations the [DEC] is required to make" or where "any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon." Under 6 NYCRR § 621.7(c), DEC must determine to hold a legislative public hearing based on whether a significant degree of public interest exists.

<sup>10</sup> Pursuant to 40 CFR § 71.11(f)(1) EPA will hold a public hearing "whenever it finds, on the basis of requests, a significant degree of public interest in the draft permit." Section 71.11(f)(2) provides that EPA "may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision."

that the Petitioner was the only commenter, DEC could have reasonably concluded that there was not sufficient public interest to hold a hearing on this permit.<sup>11 12</sup> Accordingly, EPA denies the petition on this issue.

This determination does not mean that DEC may be inconsistent in the application of its own regulations. As previously discussed, New York's regulations provide that when a member of the public requests a hearing on a draft title V permit, the determination to hold such hearing shall be based on whether "a significant degree of public interest exists."<sup>13</sup> 6 NYCRR § 621.7(c)(1). Thus, to ensure a consistent approach and to prevent further confusion as to what standard applies to public hearing requests, DEC has agreed to express the proper standard in its public notices. *See* Commitment letter at p. 5. Failure to express the proper standard and procedure in the public notices, will result in a finding of program deficiency pursuant to 40 CFR § 70.10(b). According to a recent review, DEC is substantially meeting this commitment. *See* note 5, *supra*. Furthermore, where EPA concludes that there is appropriate grounds for objecting to a permit due to inadequate public notice or improper denial of a public hearing, EPA may order a timely objection to any permit. 40 CFR § 70.8(c)(3)(iii); *see also* letter from Steven Riva, Chief, Permitting Section, EPA Region 2, to Roger Evans, DEC Region 1, dated August 29, 2001, concerning Village of Freeport, Power Plant Number 2 (advising DEC to hold a public hearing based on the degree of public interest and indicating that a failure to do so will result in an objection by EPA).

#### B. Incomplete Permit Application

Petitioner's second claim alleges that the applicant did not submit a complete permit application in accordance with the requirements of the Clean Air Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d), especially as these provisions incorporate provisions of CAA § 114(a)(3)(C). Petition at page 5. In making this claim, Petitioner incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is deficient because even a properly completed form would not include specific information required by both the EPA regulations and the DEC regulations. This earlier petition asks EPA to require corrections to the DEC program.

Petitioner's concerns regarding the DEC's application form are summarized as follows:

- The application form lacks an unequivocal initial compliance certification with respect to

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<sup>11</sup> It is not EPA's position that under all circumstances a request from only one citizens' group, no matter how many people it represents, automatically constitutes insufficient public interest. The permitting authority must independently analyze each request and make a reasonable judgment as to whether the facts before it warrant granting a particular request.

<sup>12</sup> The DEC has held hearings on draft permits where a significant degree of public interest in the permitting action was present. *E.g.*, Village of Freeport (DEC Permit No. 1-2820-00358/00002); Orange Recycling and Ethanol Production Facility, Pencor Masada Oxynol, LLC (Permit ID: 3-3309-00101/00003); Poletti Power Project (DEC Permit No. 2-6301-00084/00015).

<sup>13</sup> DEC's legislative type of public hearing meets the title V program requirement and sets forth a standard consistent with the EPA standard at 40 CFR part 71: "a significant degree of public interest" rather than the "substantive and significant issues" standard which was applied by the DEC. The significant difference is that the public need only express an interest to be informed and need not try to establish that they have specific issues relating to the findings or determinations of the DEC. The DEC can provide for hearings in addition to those required by the title V program but it is not correct to grant or deny a public hearing only on the basis of the substance and significance of the issues presented.

all applicable requirements;

- The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;
- The application form lacks a description of all applicable requirements that apply to the facility. That is, the form only requires applicants to supply numerical citations to regulations, unaccompanied by any description; and
- The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

EPA agrees with Petitioner that the compliance certification process in the application form utilized by the facility in this case, may have enabled the applicant to avoid revealing noncompliance in some circumstances. Contrary to EPA and DEC regulations, the DEC form allowed an applicant to certify that it expects to be in compliance with requirements when the permit is issued rather than make a concrete statement as to its compliance status at the time of permit application. If the facility was not in compliance but achieved compliance before the permit was issued, it may have been possible to conceal any previous noncompliance. As provided in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit “a certification of compliance with all applicable requirements by a responsible official consistent with...section 114(a)(3) of the Act.” EPA interprets this language as requiring that sources certify their compliance status as of the time of application submittal. Where certifications do not address compliance status as of the time of permit application, the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development. Compliance certifications are public documents. Thus, one purpose of the initial compliance certification is to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications. Another purpose is to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit. *See* 40 CFR §§ 70.5(c)(8) and 70.6(c)(3) and (4).

Although the application form completed by Rochdale Village did not specifically require the facility to certify compliance at the time of application, in this case, the applicant did indeed do so. In the application that was certified on December 1, 1997<sup>14</sup>, in Section II, Project Description, the applicant states, “At this time, it is believed that the facility is in compliance with all applicable federal and State (NY) regulations, including NO<sub>x</sub> RACT, 6 NYCRR part 227-2.” This statement was submitted as part of a complete application that was certified by the facility’s responsible official consistent with the provisions of 40 CFR §§ 70.5(c)(9)(i) and 70.5 (d). Thus, the applicant satisfied one of the elements of a proper compliance certification. Accordingly, EPA denies the petition with respect to this issue.

Although in this case EPA finds no basis for objection on this issue, the State and EPA agree that the application form used by applicants in New York prior to January 1, 2002 did not properly implement the EPA or the State regulations. Therefore, as detailed in the November 16,

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<sup>14</sup> EPA has copies of the application that were printed on various dates, with some variety in pagination and the arrangement of information. To our knowledge, the nature of the information has not been altered since December 1, 1997, and the differences are only in the formatting and arranging of the information. In this Order, page numbers cited will refer to the version of the application certified on December 1, 1997.

2001 commitment letter, the State changed its forms and instructions accordingly.<sup>15</sup>

The Petitioner notes three other deficiencies in the application that EPA has determined did not result in a deficient permit, although such deficiencies may compromise the process of developing a permit. The first of these is that the regulations require the statements in the permit application regarding the compliance status of the facility to include “a statement of methods used for determining compliance.” 40 CFR § 70.5(c)(9)(ii). Although the application form completed by Rochdale Village did not specifically require the facility to include a statement of methods used to determine initial compliance, in this case, the applicant did provide this information for the applicable opacity requirements. On pages 6, 13, 14, 17 and 18 of the application, the applicant explains that the “facility maintains opacity analyzers which continuously monitor and record opacity.” In the plan for complying with Reasonably Available Control Technology (RACT) regulations for nitrogen oxides (NO<sub>x</sub>) attached to the application, the facility provides evidence of previous successful stack tests for NO<sub>x</sub> emissions. Although the facility did not specifically mention in the application how it determined it was in compliance with the SIP requirement to use low sulfur fuels, it did request that its method for certifying this compliance in the future would be sampling of fuel upon delivery, along with record keeping and reporting of sulfur content data. In New York State, there are safeguards in place for ensuring compliance with the sulfur limits before the fuel reaches the consumer. In fact, the applicable requirement states that “no person shall sell, offer for sale, purchase or use” noncompliant fuels. See 6 NYCRR § 225.1(a). EPA has concluded that the petitioner was not harmed by the omission of some of the initial compliance methods from Rochdale’s application. The petition is therefore denied on this point.

Petitioner’s next point is that EPA regulations call for the legal citation to the applicable requirement accompanied by the applicable requirement expressed in descriptive terms. EPA has developed guidance, in the form of “White Papers” which were issued in order to enable States to take immediate steps to reduce the costs of preparing and reviewing initial part 70 permit applications. In “White Paper for Streamlined Development of Part 70 Permit Applications” dated July 10, 1995 (“White Paper 1”), EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. The permitting authority may allow the applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent). The Rochdale Village permit application contains codes or citations associated with applicable requirements that are readily available; that is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. The one applicable requirement that would not be readily available is that corresponding to the facility’s NO<sub>x</sub> RACT compliance plan. The applicant referenced this compliance plan (approved by the State on May 6, 1997) at page 21 of the application, “Supporting Documentation.”, and submitted it to the State as part of the

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<sup>15</sup> In summary, in accordance with the DEC’s November 16, 2001 commitment letter, the DEC permit application form was changed to clearly require the applicant to certify as to compliance with all applicable requirements at the time of application submission. The application form and instructions were changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.

complete application. Again, even though the application form in this case did not clearly require more than a citation to the applicable requirement, the applicant correctly submitted the additional required information.

This issue regarding citations also was addressed in detail in the July 18, 2000, letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC. (“July 18, 2000 letter”) The letter explained that the DEC application form and/or instructions for its operating permits program should be clarified with respect to the “non-codified” documents that include applicable requirements, such as NO<sub>x</sub> RACT plans, pre-construction and operating permits, etc. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in the printed form. Accordingly, in its November 16 commitment letter the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing.<sup>16</sup> The DEC is aware that the documentation necessary to insure the adequate public participation called for in 40 CFR § 70.7(h) must be available with the application during the public comment period.

Petitioner’s final point is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV - Emission Unit Information of DEC’s application form, there is a block labeled “Monitoring Information” that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. Rochdale Village completed this section for the fuel sulfur content, opacity and NO<sub>x</sub> emissions requirements applicable to the boilers. This information is provided on pages 13 through 18 of the application. DEC’s application forms offer applicants an opportunity to provide monitoring information at the facility level as well. In Section III - Facility Information, Rochdale Village also completed the section labeled Monitoring Information, providing similar information on proposed monitoring for fuel sulfur content, opacity and NO<sub>x</sub> emissions. This information is provided on pages 5 and 6 of the application. Because the application included a description of or reference to applicable test methods and was correctly completed, Petitioner’s fourth issue regarding the application form is without merit and accordingly is denied.

### C. Statement of Basis

Petitioner’s third claim alleges that the proposed permit entirely lacks a statement of basis, as required by 40 CFR § 70.7(a)(5), that sets forth the legal and factual basis for the draft permit conditions. Petition at page 7. Petitioner notes that, subsequent to the public comment period for the Rochdale Village permit, the permitting authority commenced incorporating a “Permit Description” in all draft permits being issued.

The requirement for the “statement of basis” is found in § 70.7(a)(5) which states:

The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.

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<sup>16</sup> As previously discussed, DEC amended its application form and instructions in accordance with the November 16 commitment letter.

The statement of basis is not a part of the permit itself. It is a separate document<sup>17</sup> which is to be sent to EPA and to interested persons upon request. This requirement for the statement of basis is not contained in § 70.6 which sets forth the required contents of the permit. In fact, § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any source-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a “statement of basis” in terms that aid both EPA and the public.<sup>18</sup> As a result, the DEC has incorporated certain elements into its “permit review reports.”<sup>19</sup> In the cited letters, EPA explains the “statement of basis” is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are intended not simply to be redundant to the permit but to assist in reviewing what is in the permit. Additionally, in a December 22, 2000 Order responding to petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method(s) be documented in the permit record. In re In the Matter of Fort James Camas Mill, (“Fort James”), Petition No. X-1999-1, at page 8 (December 22, 2000).

The regulation at 40 CFR § 70.8(c)(3)(ii) requires that the permitting authority submit any information necessary to review adequately the proposed permit. Accordingly, EPA may object to the issuance of a permit simply because of the lack of necessary information. The missing information could be a statement of basis or any other information deemed necessary to review adequately the draft permit in question. Since the statement of basis can serve a valuable purpose in directing EPA’s and the public’s attention to important elements of the permit and since it is important that EPA perform any reviews as quickly as possible, it is a required element of an approved program that EPA receive an adequate statement of basis with each proposed permit.

EPA notes that although a statement of basis, or “Permit Description,” was not made available with Rochdale’s draft permit, such a description was incorporated as part of the Rochdale Village permit issued on April 7, 2000, as well as the final effective permit issued on

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<sup>17</sup> Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. Thus, certain elements of statements of basis, if integrated into a permit document, could create legal ambiguities.

<sup>18</sup> See letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG’s March 11, 2001; November 16, 2001 DEC commitment letter; letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf>); see also Notice of Deficiency for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000).

<sup>19</sup> In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a “permit review report,” which will serve as DEC’s statement of basis. The contents of this permit review report are described in DEC’s November 16, 2001 commitment letter.

September 18, 2000.<sup>20</sup> While this discussion does not fully satisfy the requirements of § 70.7(a)(5), it does provide needed information on the permit. EPA has concluded that in spite of the recognized faults regarding this description, this issue as raised by Petitioner does not, in this case, warrant objection to the permit, for the reasons described below.

In this case, it is possible to achieve a sufficient understanding of the source using other available documents in the permit record. Some very simple sources such as Rochdale Village are easily understood through reading the permit or the application, especially when they are not subject to applicable requirements or monitoring provisions that rely on source-specific determinations or engineering judgement.<sup>21</sup> In this case, the additional information provided in Rochdale Village's application helped meet the statement of basis requirements. For example, the application explains that the boilers have continuous monitors for opacity, and the NO<sub>x</sub> RACT plan attached to the application explains that the firing of clean fuels assures compliance with the nitrogen oxides limitation. Therefore, EPA believes a more detailed explanatory document as sought by Petitioner is not necessary to understand the legal and factual basis for the draft permit conditions.

Additionally, there is no evidence that the petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on this draft permit establishing that it had a basic understanding of the terms and conditions of this permit. Furthermore, NYPIRG was the only member of the public who showed an interest in this project or filed comments on this draft permit. Accordingly, we do not believe that the circumstances of this case warrant an objection to this permit.

Nonetheless, as discussed in Section H, NYPIRG's petition on this permit is being granted on other grounds. DEC's permit issuance process now provides that a permit may not be issued unless it is accompanied by a statement of basis. Therefore, when the DEC revises the permit in response to the objection, it must also submit a complete statement of basis (permit review report) meeting the requirements of § 70.7(a)(5).

#### D. Reporting of Monitoring

Petitioner's fourth claim alleges the proposed permit repeatedly violates the 40 CFR § 70.6(a)(3)(iii)(A) requirement that the permittee submit reports of any required monitoring at least every six months. Petition at page 9. Petitioner identified contradictory language in the permit with regard to the submittal of monitoring reports. Petitioner asserts that while the general conditions section requires that monitoring reports be submitted at least every six months, the emission unit section of the permit contains individual conditions that require monitoring reports only upon request by the regulatory agency. The Petitioner asserts: "Unless

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<sup>20</sup> This description includes the nature of the "business" (four fossil fuel-fired boilers each rated at 125 million British thermal units per hour (mmBtu/hr), primarily firing natural gas and firing distillate fuel oil as a backup fuel, to provide heating, cooling, and electricity to a housing development); a discussion of the equipment and operations at the facility; air permit applicability; and a discussion of some compliance methods utilized at the facility.

<sup>21</sup> The applicable requirements listed in this permit as applying to the boilers include several regulations contained in the New York State Implementation Plan (SIP) as follows: (1) the NO<sub>x</sub> RACT requirements of 6 NYCRR § 227-2; (2) the opacity requirements of 6 NYCRR § 227-1; and (3) the limit of the sulfur content of the fuel oil to 0.20 percent by weight pursuant to the requirements of 6 NYCRR part 225. As monitoring, Rochdale Village's final effective permit includes a requirement for stack testing each permit term to determine compliance with the NO<sub>x</sub> RACT requirement, and record keeping of logs of fuel sulfur content. The additional monitoring that is needed to assure compliance is discussed below in sections H.8 and H.9.

this proposed permit is modified to clearly identify the monitoring results that must be included in Rochdale Village's six-month monitoring reports, the reports are unlikely to be useful in assuring the facility's compliance with applicable requirements." Petition at page 10.

In DEC's response to Petitioner's comments, DEC described the general condition entitled, "Monitoring, Related Recordkeeping and Reporting Requirements" as the "default" condition which applies unless a more frequent reporting period is required by a rule. The draft Rochdale Village permit included Condition 17, entitled, "Monitoring, Related Recordkeeping and Reporting Requirements," in which Item 17.2 required, among other things, that the permittee submit required monitoring reports every six months from the date of permit issuance, include all instances of deviations from permit requirements and be certified by the facility's responsible official. The final effective permit, dated September 18, 2000, contains similar language at condition 25. However, this condition also includes clarifying language explaining that, "In the case of any condition contained in this permit with a reporting requirement of 'Upon request by regulatory agency', the permittee shall include in the semiannual report, a statement for each such condition that the monitoring or recordkeeping was performed as required or requested and a listing of all instances of deviations from these requirements."

Petitioner correctly notes that other conditions in the draft permit could be read as conflicting with Condition 17. However, in the final effective permit, most terms include semiannual reporting.<sup>22</sup> The only condition that could be read to conflict with the general condition at 25 is condition 38, compliance certification, in which reporting is only required "upon request by the regulatory agency." Item 38.2 requires stack testing of the four boilers each permit term for the applicable NO<sub>x</sub> requirement. Certainly, if a test does not occur in a given six month period, there will be nothing to report for this requirement. Because the DEC has included clarifying language at condition 25, EPA believes there is no inconsistency in the reporting requirements of the permit. Accordingly, EPA finds there is no basis to object to the permit regarding this issue.

#### E. Annual Compliance Certification

Petitioner's fifth claim alleges that the proposed permit distorts the annual compliance certification requirement of the Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5). Petitioner alleges that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." Petition at page 10. Specifically, Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG asserts that the only way of interpreting the compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. Finally NYPIRG asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification.

EPA notes, first, that the language in the Rochdale Village permit follows directly the language in 6 NYCRR § 201-6.5(e) which in turn, follows the language of 40 CFR § 70.6(c)(5) and (6). Section 201-6.5(e) requires certifications with terms and conditions contained in the

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<sup>22</sup> EPA does not intend to limit the states from providing for more frequent but less formal reports such as "upon request" as long as the reports necessary for title V purposes are clearly expressed and required by the permit and are in writing.

permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in the annual certification: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the Department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the Department and to the administrator and shall contain such other provisions as the Department may require to ensure compliance with all applicable requirements. Rochdale Village's final effective permit includes this language at Condition 26, item 26.2.

EPA disagrees with Petitioner that "the basis of the certification" should be interpreted to mean that facilities are *only* required to certify compliance with the permit terms labeled as "compliance certification." "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 26 delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The references to "compliance certification" found in the permit terms do not appear to negate the DEC's general requirement for compliance certification of all terms and conditions. Because the permit and New York's regulation require the source to certify compliance or noncompliance, annually for each permit term, EPA is denying the petition on this point.

Nonetheless, EPA has conferred with DEC in an effort to minimize confusion on this point. DEC has agreed, by letter dated November 16, 2001, to include language regarding the revised annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals. DEC will add language from 40 CFR § 70.6(c)(5) to the current provision for the annual compliance certification, as follows:

"Requirements for compliance certification with terms and conditions contained in this facility permit include the following:

- i. Compliance certifications shall contain:  
the identification of each term or condition of the permit that is the basis of the certification;"

To clarify the annual reporting requirements, DEC will also add the following language to the annual compliance certification provision:

"The responsible official must include in the annual certification report all terms and conditions contained in this permit, including emission limitations, standards, or work practices. That is, the provisions labeled herein as "Compliance Certification" are not the only provisions of this permit for which an annual certification is required."

Although this issue does not present grounds for objecting to the Rochdale Village permit, the DEC has nonetheless elected to take the appropriate steps to improve the administration of its program in this regard. DEC is substantially meeting this commitment. *See note 5, supra*. As discussed in detail in Section H, below, EPA is granting NYPIRG's petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also add language to clarify the requirements of the annual compliance certification reports.

#### F. Startup, Shutdown, Malfunction

Petitioner's sixth claim is that the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it sanctions the systematic violations of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. Petition at page 11. Petitioner asserts that 6 NYCRR § 201-1.4 conflicts with EPA guidance and must be removed from the SIP and federally enforceable permits as soon as possible. In addition, Petitioner asserts that the permit lacks proper limitations on when a violation may be excused and lacks sufficient public notice of when a violation is excused.

Permit condition 5, states, in part, "At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable." Petitioner argues that condition 5 is so expansive that it makes emission limits very difficult to enforce and departs from EPA guidance that requires facilities to make every reasonable effort to comply with emission limitations even during startup/shutdown, maintenance and malfunction conditions.<sup>23</sup> Accordingly, Petitioner asserts, the Administrator must object to the proposed permit because it does not include conditions to assure compliance with all applicable requirements as required by 40 CFR § 70.6(a)(1).

With respect to enforcement discretion, EPA recognizes and approves such provisions in State SIPs in accordance with EPA guidance, and Condition 6 is modeled upon a provision in the New York SIP. It sets forth the notification requirements that a facility owner and/or operator must follow in the case of excess emissions caused by start-up, shutdown, malfunctions, or upsets. The conditions provide a detailed and thorough procedure to report and correct such violations. These notice requirements are included in the approved SIP and must be adhered to. Moreover, failure to notify the DEC of the emission violation on a timely basis precludes consideration of the reason for the emission violation in order to mitigate the enforcement response. This procedure is required for occurrences where a source hopes to avail itself of enforcement discretion, but does not establish any right to be excused for the excess emission occurrence.

It is EPA's view that the Act, as interpreted in EPA policy, does not allow for automatic exemptions from compliance with all applicable SIP emissions limits during start-up, shut-down, malfunctions or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. *See* note 23. To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes it should not be approved as part of the federally approved SIP. *See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, ("Pacificorp"), at

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<sup>23</sup> *See* Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," (Bennett Memo September 1982); memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," dated February 15, 1983 (Bennett Memo February 1983); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated September 20, 1999 ("September 1999 Guidance"); and Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled "Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated November 8, 2001 ("November 2001 Clarification").

page 23 (November 16, 2000), available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>.

EPA is not aware of, and the petitioner has provided no evidence of, any instances where the DEC relied on these rules to provide blanket exceptions for non-compliance merely because the incidents were reported. Moreover, DEC's response to comment letter to EPA and NYPIRG on the draft title V permit for the Rochdale Village facility<sup>24</sup> demonstrates to EPA that the DEC's interpretation and application of section 201-1.4 is not inconsistent with the Act, as interpreted by EPA in its guidance.

In any event, as explained in the Pacificorp decision, "even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the 'applicable requirement' as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions." See Pacificorp at 23-24.

The position set forth in Pacificorp was reiterated in the November 2001 Clarification which confirms that the September 1999 Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions including opacity provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this Guidance is based. See November 2001 Clarification at p. 1.

In sum, Condition 5 merely restates requirements for reporting certain excess emissions and does not, itself reduce the effectiveness of any applicable requirements derived from State requirements. The DEC's unavoidable non-compliance and emergency requirements are part of the approved SIP. Whether the SIP meets the guidance is not an appropriate subject for an objection to a specific permit and is not a reason to object to the permit. Accordingly, the petition is denied on this point.

NYPIRG further asserts that the requirement of 40 CFR § 70.6(a)(1), that permits contain monitoring sufficient to assure compliance, also applies to the excuse provision of 6 NYCRR § 201-1.4 to assure that the provision is not abused. EPA agrees with this general proposition. However, since the DEC Commissioner has discretion to excuse certain violations, any abuse of

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<sup>24</sup> Letter from Elizabeth Clarke, Environmental Analyst, DEC, Region 2, to Steven C. Riva, Chief, Permitting Section, EPA Region 2, dated February 18, 2000, Responses to NYPIRG Comments re: General Permit Conditions, number 10, Unavoidable Noncompliance and Violations, page 4 of 7. The response reads, "This condition is as explicit as necessary and does not excuse or diminish, in any way, the accountability of a source for pollution exceedances. It sets forth a practical procedure for notifying the agency...[T]he agency uses engineering judgment on a case-by-case basis to make a determination as to the unavoidable status of an exceedance. The department also cannot exercise more discretion than federal requirements allow."

the excuse provision would be by DEC and not by the source for simply asking for the excuse. In accordance with the provisions of the title V permit, the source is required to monitor compliance, and any violation for which an excuse is sought will be included in the facility's deviation reports, semi-annual reports and annual reports. Petitioner has not demonstrated that any additional monitoring of the source is required to assure proper exercise of the excuse provision by DEC.

As previously discussed, 6 NYCRR §§ 201-1.4 and 201-1.5(e) provide the Commissioner with a discretionary authority to excuse unavoidable non-compliance and violations when certain conditions are met. Moreover, 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC's own rules do not authorize expansion of the Commissioner's discretion. The DEC's rules, as amended, provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In DEC's Response to Comments Document, DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." Responsiveness Summary re: General Permit Conditions, No. 10, Page 4 of 7.

While the DEC may recognize the limits of its discretion, the permit term as written may be misleading to the permit recipient and should be revised to be consistent with requirements of the Act and the applicable scope of 6 NYCRR § 201-1.4. Accordingly, for permits issued after January 1, 2002, DEC has committed to move this condition to the State side of the permit.<sup>25</sup> While a source operator may be misled into seeking the Commissioner's action on a violation during start-ups, shutdowns, malfunctions or upsets, EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the State regulations. Accordingly, the petition is denied with respect to this issue.

Petitioner raised several additional points on the issue of start-up, shutdown and malfunction which warrant further discussion.

1. Petitioner states that New York's regulation 6 NYCRR § 201-1.4 and the corresponding language in the permit do not conform to EPA's September 20, 1999 guidance entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" ("September 1999 Guidance"). The petitioner generally alleges that the New York regulation has created a loophole for facilities complying with emission limits because facilities routinely use the excuse provision without proving the violation was unavoidable. The petitioner, however, does not provide any specific examples of sources relying on the excuse provision improperly nor does petitioner allege that any abuses of the excuse provision or commissioner discretion provision occurred in this case. Rather, the petitioner suggests that terms addressed in the September 1999 Guidance should be added to the permit. We conclude that it is not necessary for the DEC to restate the September 1999 Guidance in the permit as the guidance is policy and does not constitute an applicable requirement. *See* November 2001 Clarification. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it would include the provision of 6 NYCRR § 201-1.4 on the State side of all permits. *See* note 25.

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<sup>25</sup> DEC is substantially meeting this commitment. *See* note 5. As discussed in detail in Section H, below, EPA is granting NY PIRG's petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side of the permit.

2. Petitioner asserts the permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation “unavoidable.” As discussed in section F, above, the commissioner discretion conditions apply only to State requirements and cannot apply to federally promulgated requirements. In its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it would include the revised provision of 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of all permits. DEC is substantially meeting this commitment. *See* note 5, *supra*.

3. Petitioner states that all significant terms must be defined in the permit. The petitioner alleges that the permit is not practically enforceable because the permit lacks definitions for “malfunction,” “upset,” and “unavoidable.” EPA disagrees with the Petitioner on this issue. The purpose of the permit is to ensure that a source operates in compliance with all applicable requirements. To the extent Petitioner argues that this requirement extends to compliance with the SIP-based commissioner discretion provision, EPA agrees. However, the lack of definitions for the terms “malfunction,” “upset” or “unavoidable” does not, on its face, render the permit unenforceable. These are commonly used regulatory terms. Moreover, Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the State side of all permits. *See* note 25. This will help further assure that the excuse provision is not expanded beyond its proper bounds.

4. Petitioner also states that the permit must define reasonably available control technology (RACT). 6 NYCRR § 201-1.4(d) and 6 NYCRR § 201-5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. The petitioner claims that the proposed permit does not define what constitutes RACT or how the government or public knows whether RACT is being utilized at those times. As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the “applicable requirement” as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. Pacificorp at 23-24; *see also* November 2001 Guidance at p.1.

5. Petitioner next asserts that any title V permit issued to Rochdale Village must require prompt written reporting of all deviations from permit requirements including those due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). Petitioner states that the permit must require written reports of all deviations.

As written, the permit only requires the permittee to inform DEC of an exceedance when seeking to exercise the excuse provision of 6 NYCRR § 201-1.4. Otherwise, the permit provides that written notifications be provided when requested to do so by the Commissioner. Prompt reporting of deviations is required by 40 CFR § 70.6(a)(3)(iii)(B) which states,

Prompt reporting of deviation from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define “prompt” in relation to the degree and type of deviation likely to occur and the applicable requirements.

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See*

Discussion in Part G *infra*. For a violation to be properly excused, the DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. As further discussed below, EPA denies the petition on this point.

#### G. Prompt Reporting of Deviations

Petitioner's seventh claim is that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petition at page 16. The petitioner states that the only prompt reporting of deviations is that required by 6 NYCRR § 201-1.4, which governs unavoidable noncompliance and violations during necessary scheduled equipment maintenance, start-up/shutdown conditions and upsets or malfunctions. *See* Condition 17, Item 17.2 (ii) of the April 7, 2000 permit. However, the final effective permit dated September 1, 2000 does not include this provision, nor any provision directly addressing prompt reporting of deviations. Petitioner argues that any other deviations, including situations where the permittee could have avoided a violation but failed to do so, will not be reported until the six-month monitoring report. The petitioner alleges that six months cannot be considered "prompt reporting" in all cases.

EPA agrees with Petitioner's comment. EPA raised this issue with DEC in the July 18, 2000 letter at Attachment III, item 2. The DEC may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. As discussed above, EPA does not consider reports submitted for the purpose of preserving potential claims of an excuse to meet prompt reporting requirements because these reports are optional, and they may not include all deviations, instead only those potentially unavoidable violations that the source seeks to have excused. All deviations must be reported regardless of whether the source qualifies for the excuse. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).<sup>26</sup>

In Rochdale Village's permit, there are no specific instances of "prompt" being defined as more frequently than semiannually. Below in section H.9., we discuss an additional opacity monitoring provision that must be added to the permit. This revision will create a need for reporting more often than is specified in the applicable requirement. Specifically, if the COMs record opacity in excess of the allowable limits, and continue to record excess opacity for more than an hour, it would be appropriate for Rochdale Village to report this more promptly than quarterly, as required by part 227. For example, EPA's regulations provide in 40 CFR § 71.6 (a)(3)(iii)(B)(2) that sources report to the permitting authority within 48 hours, all instances of excess emissions of pollutants that are not hazardous air pollutants, which continue for more than two hours. With respect to the other applicable requirements of the permit, reporting deviations more frequently than every six months, or the frequency specified in the underlying applicable requirement, whichever is more frequent, is not necessary. Thus, EPA denies the petition on this issue.

EPA has addressed the prompt reporting requirement with the DEC in order to clarify how the DEC will properly exercise this discretion. In the November 16 commitment letter,

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<sup>26</sup> Prompt reporting requirement applicable to sources under the federal operating permit program.

DEC agreed that for all permits issued on and after January 1, 2002, it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). DEC is substantially meeting this commitment. *See* note 5, *supra*. While this regulation requires inter alia that deviations be reported at least every six months, DEC stated that it will specify less than six months for “prompt” reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. DEC has stated that it finds the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii)(B)) to be reasonable and compatible with what is provided for in DEC regulations. Therefore, DEC intends to mirror these provisions to define “prompt” reporting in permit conditions. When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, in the time frame established in the permit condition. As discussed in detail in Section H, below, EPA is granting NYPIRG’s petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also incorporate these additional prompt reporting requirements into the permit.

Whether or not the State has adopted a general policy on prompt reporting, the specific application of the prompt reporting requirement is a matter of discretion and is subject to review and objection by EPA.

#### H. Monitoring

Petitioner’s eighth claim is that the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions (1) lack adequate periodic monitoring and (2) are not practically enforceable. Petition at page 17. The Petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practically enforceable.<sup>27</sup> The specific allegations for each permit condition are discussed below. EPA is denying Petitioner’s request that the Administrator object to issuance of the permit for seven of the ten allegations, and granting Petitioner’s request for three of the allegations, as delineated below.

Section 504 of the Act makes it clear that each title V permit must include “conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan” and “inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.” 42 U.S.C. § 7661c(a) and (c). In addition, Section 114(a) of the Act requires “enhanced monitoring” at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. 42 U.S.C. § 7414(a).

The regulations at 40 CFR § 70.6(a)(3) specifically require that each permit contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit” where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). In addition, 40 CFR § 70.6(c)(1) requires that all part 70 permits contain, consistent with 40 CFR § 70.6(a)(3), “compliance certification,

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<sup>27</sup> With respect to lack of adequate periodic monitoring, the Petitioner cites 40 CFR § 70.6 (a)(3) which requires monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance; and § 70.6 (c)(1) which requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. With respect to practical enforceability, the Petitioner cites the U.S. EPA’s Periodic Monitoring Guidance, September 15, 1998, at 16 which has since been vacated. Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” These requirements are also incorporated into New York’s regulations at 6 NYCRR § 201-6.5(b).

Recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, the court addressed EPA’s compliance assurance monitoring (“CAM”) rulemaking (62 Fed. Reg. 54940 (1997) (promulgating, inter alia, 40 CFR part 64) in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA’s periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

EPA summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Clean Air Act in two recent orders responding to petitions under title V requesting that the Administrator object to certain permits. See In re Pacificorp’s Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, November 16, 2000 (“Pacificorp”) (available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>), and In re Fort James Camas Mill, December 22, 2000. Please see pages 16-19 of the Pacificorp order for EPA’s complete discussion of these issues. In brief, EPA concluded that in accordance with the D.C. Circuit decisions, where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of § 70.6(c)(1) that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.” 40 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at § 70.6(c)(1) applies instead. The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

#### Facility-Specific Petition Issues <sup>28</sup>

1. Petitioner alleges that general permit Condition 3, item 3.1, citing 6 NYCRR § 200.7, should not be included in the Rochdale Village permit unless Rochdale Village actually operates pollution control equipment. This condition states that pollution control equipment should be maintained according to ordinary and necessary practices, including manufacturer specifications. The Petitioner alleges that if there is control equipment, such condition must be supplemented with monitoring. Petition at page 18. In DEC’s Response to Comments, DEC stated that this condition is a general requirement that is applied to all air permits, and that the condition is included even where no applicable requirement necessitates the use of control equipment. DEC further stated that control equipment maintenance plans are typically submitted as part of the application, but do not become enforceable parts of the permit. Responsiveness Summary re: General Permit Conditions, No. 8, page 3 of 7. In this case, although the permit does not specifically state that Rochdale Village does not employ control equipment, the process description at condition 37 of the final effective permit does state that “there are no physical or

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<sup>28</sup> Issues H.1. through H.6. were addressed previously in the Orders responding to the Yeshiva, Action Packaging, and Kings Plaza petitions (see Footnote 3). In the Yeshiva decision, see issues H.1. to H.5. and H.7.a., on pages 25-31. In the Action Packaging decision, see issues H.1. to H.6., on pages 24-28. In the Kings Plaza decision, see issues H.1. to H.6., on pages 25-29.

operational limits on any of the boilers.” From this, the public can deduce that there is no control equipment.

Petitioner states that if 6 NYCRR § 200.7 does not apply to Rochdale Village, this condition must be deleted from the permit. EPA disagrees with Petitioner. Many SIPs contain generic requirements for facilities to maintain all equipment in proper condition. These generic requirements are typically provided in the general permit conditions section of the title V permit. EPA agrees with petitioner that it may be confusing to include such general conditions when a facility does not have control equipment. Nonetheless, EPA finds that permitting authorities have discretion to develop general permit conditions that apply to all title V sources. EPA also agrees that some facilities maintain control equipment although not subject to any specific applicable requirement; thus, including the general SIP condition is proper.

Furthermore, EPA disagrees with Petitioner that monitoring must be added to this provision. Where control equipment is installed pursuant to an applicable requirement, DEC includes such requirement under the emission units section of the title V permit, not the general permit condition section. To support such a requirement, DEC would then include monitoring sufficient to assure compliance. In this particular case, because Rochdale Village is not subject to any requirements to operate and maintain a control device, no specific monitoring for control equipment is necessary. For other permits, where a control device is maintained, monitoring should be provided under the emissions unit section as the DEC deems necessary, and not under the general permit condition section of title V permit. Therefore, EPA denies the petition on this point.

2. Petitioner also raises concern about Condition 4, Item 4.1, relating to unpermitted emission sources. The condition, restating 6 NYCRR § 201-1.2 (adopted March 20, 1996), provides that if an existing emission source was subject to the permitting requirements of 6 NYCRR part 201 at the time of construction or modification and the owner or operator failed to apply for a permit, then the owner or operator must now apply for a permit. The condition further states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities. Petitioner asserts that the condition is confusing because if the facility is subject to NSR or PSD, such condition should be in the permit. Petitioner argues that it is unclear from the permit or the application whether the facility is subject to a pre-existing permit. Petitioner is also concerned that a source may not be subject to penalties if it applies for a permit as required by Condition 4, Item 4.1(a). Petition at page 20.

EPA notes that this provision does not relieve the permitting authority or permittee from including applicable construction permit conditions in the permit. In addition, if the facility is in violation for not having proper construction permits, the permit must include a compliance schedule. 40 CFR § 70.6(c)(3). Condition 4 merely expands on what is required by the SIP at 6 NYCRR § 201.2(a) – that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit – by naming some additional terms for those who violate permitting requirements.

NYPIRG’s specific concern that the permit shield could preclude the imposition of penalties is unfounded. The permit shield provides that compliance with the conditions of the permit is deemed to be compliance with those applicable requirements specifically identified in the permit and/or those requirements that the State specifically identifies in the permit as not applicable. 40 CFR § 70.6(f). A permit shield can not exonerate or protect from enforcement a facility that lacks proper construction permits. Furthermore, there is no determination in the permit that NSR is not applicable to Rochdale Village. Therefore, if a violation were later

discovered, the permittee would need to apply for the proper construction permits, the title V permit would be reopened, and the facility may be subject to related enforcement actions. Condition 4 directs what the permittee must do to achieve compliance; it does not address the penalties that may result from non-compliance. Therefore, the condition does not preclude the public, DEC or EPA from bringing an enforcement action and seeking penalties from the facility. Accordingly, EPA denies the petition on this point.

3. Petitioner alleges that the two permit conditions addressing the handling of air contaminants collected in an air cleaning device should not be included if Rochdale Village does not operate control devices. If Rochdale Village does have control devices, then the Petitioner alleges that the condition should include record keeping requirements. Petition at page 21. DEC responded that the condition is in all permits regardless of whether the facility has air pollution control devices. Responsiveness Summary re: General Permit Conditions, No. 13, page 4 of 7.

EPA denies the petition on this point. As stated in response to issue H.1 above, States have discretion to include as general permit conditions, language from the general provisions of the SIP. For facilities where an applicable requirement specifies a control device, then appropriate monitoring requirements must be included under the emissions unit section of the title V permit.

4. Petitioner asserts that facility level Condition 12, Item 12.1 (i), which says the facility shall operate in accordance with any accidental release plan, response plan or compliance plan, is problematic because the requirements in these documents should be incorporated into the permit as permit terms. If not incorporated, the Petitioner asserts that such documents should be clearly cross referenced in the permit. Petitioner also suggests that this general condition should be deleted from the permit altogether since it adds nothing to the permit. Petition at page 21.

EPA disagrees with Petitioner that all types of plans must be part of a title V permit. For instance, risk management plans under 112(r) are not incorporated into a title V permit. However, EPA does agree that certain documents should be properly cross-referenced in title V permits. Compliance plans required pursuant to a NO<sub>x</sub> RACT SIP rule are not fully incorporated into title V permits, but if a facility is required to have one of these plans, it must be incorporated by reference into the title V permit.

In certain cases a facility must comply with a plan that is not part of the title V permit. Thus, DEC's general condition is essential to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. Where the facility is subject to plans such as NO<sub>x</sub> RACT or start-up, shut-down, and malfunction plans under a maximum achievable control technology (MACT) standard, the permit must specifically say so. However, the general condition can serve only as a reminder to the permittee to comply with and apply for requisite permit amendments on a timely basis. In this case, there is no allegation that this facility requires such plans.

Because the Petitioner does not allege any specific plans that should have been, but were not, included in the permit as an applicable requirement, EPA denies the petition on this issue.

5. The Petitioner alleges that the general permit condition, Condition 14, Item 14.2, which states "[r]isk management plans must be submitted to the Administrator if required by Section 112(r)" should state whether the facility is or is not subject to 112(r). Petition at page 22.

While EPA agrees with petitioner that this provision is very general and does not provide information regarding the applicability of § 112(r) to this particular source, we do not believe that

the absence of such a determination provides a basis for EPA to object to this particular permit. Rochdale Village did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,<sup>29</sup> and given what we know about this source, it is reasonable to assume that Rochdale Village is not subject to these statutory and regulatory requirements. Accordingly, at most it was harmless error in this case that the permit does not specify the applicability of § 112(r) and part 68 to this facility.

Furthermore, DEC did not take delegation of § 112(r), and therefore, EPA is responsible for implementing such requirements in New York. However, it is understood that all applicable requirements must be included in title V permits. As such, during the early stages of implementation of New York's title V program, EPA asked DEC to include a general requirement regarding § 112(r) in all permits (based on language prepared by EPA). New York has included such general language on § 112(r) in all title V permits as requested by the EPA, and although we agree with petitioner that this condition is not optimal, as discussed above, the circumstances of this case do not warrant objecting to the permit on this issue. Therefore, EPA denies the petition on this point.

6. The Petitioner alleges that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. Petition at page 22. The Petitioner specifically points to condition 30 which prohibits the emissions units at Rochdale Village from exceeding 20% opacity over a six minute average, and 57% in any single six minute period during each hour. Condition 30 is a facility level condition. DEC responded that this condition is in the SIP and applies to all sources.

EPA disagrees with the Petitioner that the permit needs to include monitoring for the requirement listed in Condition 30. This condition applies at a facility-wide level. Because different emissions units can create opacity through different processes (combustion, material storage) and reach the atmosphere in different ways (stacked, fugitive), permittees may not know how to comply with a facility-wide monitoring condition. Indeed, an operator may be unable to conduct the same kind of monitoring at each opacity-emitting emissions unit at a facility. Therefore, it is more appropriate to create monitoring in the Emission Unit Level section of the permit. Below in H.9., the adequacy of the opacity monitoring for specific emissions units is discussed.

7. Petitioner asserts that the citation in Condition 34 to 6 NYCRR § 225-1.8(b) is improper, as this rule only applies to owners or operators of facilities that sell oil and/or coal. Petitioner identifies § 225-1.8(a) as the more appropriate applicable requirement. Petitioner further asserts that adequate monitoring and reporting is mandated by 6 NYCRR part 201 and 40 CFR part 70. Petition at page 24.

EPA agrees with Petitioner that the provision at 6 NYCRR § 225-1.8(b) does not apply to Rochdale Village, because the facility does not engage in selling oil, only the purchasing and consuming of oil. EPA also agrees that § 225-1.8(a) does apply to Rochdale Village, as a general monitoring condition designed to support the fuel sulfur content limitations listed elsewhere in part 225. In the final effective permit of September 18, 2000, DEC included at condition 33 a provision to implement § 225-1.8(a). Item 33.2 requires records, test results and reports to ensure compliance with the provisions of part 225-1. EPA has no objection to this condition. However, condition 34 of the final effective permit incorrectly cites 6 NYCRR § 225-1.8(b) as an

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<sup>29</sup> All Risk Management Plans are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816-4434.

applicable requirement, and therefore, the condition must be deleted. EPA is granting the petition on this issue, and DEC must reopen the permit to remove this improper condition.

It is important to note here that 6 NYCRR § 225-1.8 is part of the State code that has been revised since last being submitted to EPA for approval into the SIP. EPA approved this rule on November 12, 1981 (46 FR 55690). The SIP provision pertaining to “Reports, sampling and analysis” at 6 NYCRR § 225.7(a), although no longer a current NY State rule, is still in the SIP and is therefore federally enforceable. The SIP approved regulation is the applicable requirement that must be included in the title V permit. Therefore, when the DEC reopens the permit to make other changes as required by this Order, EPA recommends that DEC also cite the correct applicable requirement in condition 33, the SIP provision at 6 NYCRR § 225.7(a). It would be improper to cite the current State version, at 6 NYCRR § 225-1.8(a), on the federal side of the permit, because this rule is not federally approved.

Because the substance of these two versions of Part 225 is identical, DEC may wish to streamline these requirements. In “White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program” dated March 5, 1996 (“White Paper 2”), EPA presented a procedure whereby States and sources can determine the set of permit terms and conditions that will assure compliance with all applicable requirements for an emissions point or group of emissions points so as to eliminate redundant or conflicting requirements. Accordingly, DEC may choose to subsume the State-only enforceable provision into the SIP provision, provided the permit and the statement of basis explain that compliance with the SIP-approved rule assures compliance with the State rule, while both the federally-approved rule and the State rule continue to apply. In addition, the DEC must ensure that the permit shield applies to the subsumed requirement.

8. The Petitioner alleges two deficiencies in the permit with regard to the NO<sub>x</sub> RACT limit for the four boilers. Petition at page 24. The permit requires a once per permit term stack test. The Petitioner asserts that (a) some form of additional monitoring needs to be added to the permit to assure ongoing compliance, and semiannual reporting must be required; and (b) DEC must revise the permit to eliminate improper credible evidence limiting language.

(a) Rochdale Village has a NO<sub>x</sub> RACT compliance plan that was approved by DEC on May 6, 1997. In this plan, Rochdale Village is required to submit quarterly reports of natural gas and fuel oil consumption data. This reporting mechanism is sufficient to assure compliance with the RACT limit. Specifically, according to stack test results, as long as the fuels burned are restricted to natural gas and distillate oil, all four boilers will have a wide margin of compliance with respect to the SIP limit of 0.3 lb NO<sub>x</sub> per mmBtu. The highest test result reported was 0.23 lb/mmBtu, giving a minimum margin of compliance of 23%. DEC failed to incorporate this requirement into the permit and therefore it must revise the permit to include this required reporting, and to specify in the permit that the authority for this requirement is the approved NO<sub>x</sub> RACT compliance plan. Therefore, EPA is granting the petition with respect to this issue.

(b) The Petitioner also alleges that the permit includes language that eliminates the right of the public, government regulators and the source to rely on other credible evidence to demonstrate compliance. Condition 38, item 38.2 states that “compliance with the specific emission limit is verified through stack testing.” Petition at page 25.

EPA disagrees with the Petitioner. Nothing in the permit limits EPA, DEC or citizens from using any credible evidence to bring an enforcement action for NO<sub>x</sub> violations. The permit does not say stack testing is the sole or exclusive method used to determine compliance. Rather, the permit condition states that the “Compliance Certification shall include the following

monitoring” and thus, does not preclude the use of any other method for determining compliance. Therefore, EPA denies the petition regarding the alleged use of credible evidence limiting language.

9. Petitioner alleges three flaws in the conditions that incorporate the opacity standard for the boilers. First, Petitioner identifies a SIP-approved version of the rule that is different from the current State rule, and asserts the permit should include the SIP-approved rule. Secondly, Petitioner alleges that the periodic monitoring is not adequate. As part of this allegation, the Petitioner states that the DEC must explain why continuous opacity monitors (COMs) are not required. Thirdly, Petitioner asserts that the permit illegally limits the type of evidence that can be used to demonstrate compliance. These issues are addressed individually below.

(a) At the time Rochdale Village submitted its permit application, the SIP-approved opacity rule was very different than the State’s adopted rule. In 1999, DEC submitted a revised opacity rule to EPA for approval into the SIP. EPA approved this revised rule on April 19, 2000 (65 FR 20905), effective on May 19, 2000. Thus, the opacity rules cited in Rochdale Village’s permit were federally enforceable well in advance of the final effective permit issued on September 18, 2000. Thus, Petitioner’s claim is without merit and EPA denies the petition on this point.

(b) Petitioner raises the periodic monitoring issues with respect to conditions 39 through 46, inclusively, of the final effective permit. Petition at page 25. In these conditions, the opacity requirement from the State regulation at 6 NYCRR § 227-1.3(a) is incorporated. These permit conditions specify that oil fired boilers which do not use COMs must conduct daily observations of visible emissions as well as an official Method 9 test upon request by DEC.

EPA notes that the applicant proposed to use its existing COMs as periodic monitoring, when it submitted its permit application to DEC. In fact, 6 NYCRR § 227-1.4(a) (and the SIP at 6 NYCRR § 227.5(a))<sup>30</sup> requires facilities operating combustion installations with total maximum heat input capacity exceeding 250 mmBtu/hr to install, operate and properly maintain COMs. Rochdale Village’s boilers constitute a combustion installation, as defined in 6 NYCRR § 200.1(m), with a total heat input exceeding 250 mmBtu/hr. Thus, the facility must continue to operate and maintain its existing COMs. DEC must reopen and revise the permit to require this monitoring method. Also, Rochdale Village must report its monitoring results on a quarterly basis according to 6 NYCRR § 227-1.4(b). The DEC must ensure the revised permit includes this reporting requirement as well. Because EPA finds that DEC failed to properly include the periodic monitoring required by the SIP and the monitoring included in the permit for opacity is inappropriate, EPA is granting the petition on this issue. Further, EPA has determined that it would be appropriate for substantial deviations from the emissions limit of 6 NYCRR § 227-1.3(a) to be reported more frequently than quarterly. Therefore, DEC must specify prompt reporting of such deviations in the permit. EPA recommends a reporting period of 48 hours for deviations with a duration greater than two hours. *See* 40 CFR § 71.6 (a)(3)(iii)(B)(2).

(c) The Petitioner also alleges that the permit includes “credible evidence buster” language by stating “compliance is ‘based upon the six minute average in reference test Method 9 in Appendix A of 40 CFR 60.’” Petition at page 27. The Petitioner alleges that such language makes Method 9 the exclusive benchmark for demonstrating compliance, and precludes the use

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<sup>30</sup> 6 NYCRR § 227-1.4(a), although state-enforceable, has been disapproved by EPA, and thus is not a part of New York’s SIP. The governing federally enforceable regulation is from the 1972 version of the SIP, at 6 NYCRR § 227.5(a), which is similar to the current state rule except that it does not exempt gas turbines from this requirement.

of other credible evidence in demonstrating noncompliance.

EPA disagrees with the Petitioner. Nothing in the permit limits EPA, DEC or citizens from using any credible evidence to bring an enforcement action for opacity violations. The permit does not say Method 9 is the sole or exclusive method used to determine compliance. Rather, the permit condition states that the “Compliance Certification shall include the following monitoring” and thus, does not preclude the use of any other method for determining compliance. In addition, the recently approved SIP regulation at 6 NYCRR § 227-1 states, in part, that, “Compliance with the opacity standard may be determined by....or, (3) *considering any other credible evidence.*” 6 NYCRR § 227-1.3(b) (emphasis added). Therefore, EPA denies the petition regarding the alleged use of credible evidence buster language.

10. The Petitioner makes two allegations regarding permit condition 46 of the April 7, 2000 permit, limiting the sulfur content in fuel oil.<sup>31</sup> (a) Petitioner alleges this State-only permit condition should actually be labeled as a federally enforceable condition, noting that the 0.20 percent by weight sulfur in fuel limit originates from 6 NYCRR subpart 225.1, which is in the SIP; and (b) Petitioner also asserts that this requirement should be amended to require the facility to maintain records of the sulfur content for each fuel delivery, and submit periodic reports of this information to DEC. Petition at pages 28-29.

(a) NYPIRG notes that the current State version of the rule is only enforceable by DEC, while the SIP version is enforceable only by EPA and the public. DEC noted in their response that the current State version of 6 NYCRR subpart 225-1 is slightly different than the version in New York’s SIP. EPA and NYPIRG have noted that the two regulations are environmentally equivalent. In the final effective permit dated September 18, 2000, DEC placed this applicable requirement at condition 32, on the federally enforceable side of the permit. Therefore, the Petitioner’s claim no longer has merit, and EPA denies the petition on this point.

The rule pertaining to “Fuel Composition and Use” at 6 NYCRR § 225.1(a)(3), although no longer a current NY State rule, is still in the SIP and is therefore federally enforceable. The SIP approved regulation is the applicable requirement that must be included in the title V permit. Therefore, when the DEC reopens the permit to make other changes as required by this Order, EPA recommends that DEC also cite the correct applicable requirement, the SIP provision at 6 NYCRR § 225.1(a)(3), in condition 32. It would be improper to cite the current State version, at 6 NYCRR § 225-1.2(a)(2), on the federal side of the permit, because this rule is not federally approved.

Because the substance of these two versions of Part 225 is identical, DEC may wish to streamline these requirements. In “White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program” dated March 5, 1996 (“White Paper 2”), EPA presented a procedure whereby States and sources can determine the set of permit terms and conditions that will assure compliance with all applicable requirements for an emissions point or group of emissions points so as to eliminate redundant or conflicting requirements. Accordingly, DEC may choose to subsume the State-only enforceable provision into the SIP provision, provided the permit and the statement of basis explain that compliance with the SIP-approved rule assures compliance with the State rule, while both the federally-approved rule and the State rule continue to apply. In addition, the DEC must ensure that the permit shield applies to the subsumed

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<sup>31</sup> Issues very similar to those in H.10. were addressed previously in the Orders responding to the Yeshiva and Kings Plaza petitions (see Footnote 3). In the Yeshiva decision, see issue H.8., on page 34. In the Kings Plaza decision, see issue H.11., on page 34.

requirement.

(b) The monitoring associated with this condition was improved through the process of withdrawing and reissuing the permit. Condition 32 of the final effective permit now reflects the proposed monitoring in Rochdale Village's application. The facility proposed to maintain records of oil purchased, with samples being taken for each delivery. The final effective permit requires record keeping per delivery and semiannual reporting of sulfur content in fuel delivered to and used by Rochdale Village. Because the Petitioner's concerns here no longer have merit, EPA is denying the petition on this basis.

### **III. CONCLUSION**

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I grant issue H.7., addressing applicable sulfur requirements, and issues H.8. and H.9., addressing monitoring for NO<sub>x</sub> and opacity requirements. I object to the issuance of the Rochdale Village permit on those points, and deny the balance of NYPIRG's petition.

Dated: \_\_\_\_\_

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Christine Todd Whitman  
Administrator